Supreme Court, U. S.
FILED
JUN 9 1976
MICHAEL RODAK, JR., CLERK

No. 75-1621

In the Supreme Court of the United States

OCTOBER TERM, 1975

MIRA SLOVAK, PETITIONER

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. The National Transportation Safety Board suspended petitioner's airline transport pilot certificate for 30 days (Pet. App. A.17). It found that petitioner had violated Sections 91.9, 91.79(a) and 91.79(b) of the Federal Aviation Regulations[1] by operating an aircraft in a careless or reckless manner so as to endanger the life or property of another, by operating an aircraft below an altitude allowing an emergency landing to be made without undue hazard to persons or property on the surface, and by operating an aircraft over an open air assembly of persons at an altitude of less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet.

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[1] 14 C.F.R. 91.9, 91.79(a) and (b).

Petitioner was to have been a participant in the Reno National Air Races on September 15-17, 1972, but arrived too late to qualify. Because petitioner had been the winner of the first Reno air races, he was asked to fly several laps around the race course prior to the start of the races (Pet. App. A.20-A.21). While there was a waiver of certain federal air regulations in effect for the participants of the races themselves, this waiver was not applicable to petitioner's unscheduled exhibition (Pet. App. A.14).

Petitioner flew exhibitions on September 15 and 16 without incident. On September 17, however, without authorization (Pet. App. A.14, A.21), petitioner flew over a ramp, on which there were several aircraft and 2,500 to 5,000 persons, at an altitude of 10 to 25 feet and a speed in excess of 300 miles per hour (Pet. App. A.21). This maneuver also brought petitioner's aircraft within 400 feet of spectator stands in which there were 20,000 persons (*id.* at A.15, A.21, A.23). Petitioner then landed the aircraft on the ramp within 200 feet of other aircraft (*id.* at A.16, A.22, A.24). The closest boundary of the race course, by contrast, was 1,000 feet from the spectator stands (*id.* at A.10-A.11).

On December 21, 1972, petitioner was notified by the Federal Aviation Administration that his airline transport pilot certificate was to be suspended for 60 days. Petitioner appealed his suspension to the National Transportation Safety Board (Pet. App. A.18-A.19). After a full evidentiary hearing, an administrative law judge of the Board upheld the suspension (*id.* at A.18-A.30). Petitioner appealed this decision to the full Board, which affirmed but reduced the suspension to 30 days (*id.* at A.10-A.17). It wrote (*id.* at A.16-A.17):

> Air race operations, including demonstration flights such as [petitioner's], have an exceedingly narrow margin of safety which can be overstepped easily if the regulations and rules governing such operations are not adhered to strictly. It was [petitioner's] failure in the above regard which led to the violations established herein, which violations in turn must be characterized as serious in nature.

Petitioner sought review in the court of appeals, which ruled that the Board's decision was supported by substantial evidence (Pet. App. A.3-A.4).

2. Petitioner's primary contention is that the federal air regulations were not applicable to petitioner's flight because that flight was purely intrastate.[2] This argument is insubstantial. Section 1108(a) of the Federal Aviation Act of 1958, 72 Stat. 731, 798, 49 U.S.C. 1508(a), provides that "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States * * *."

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

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[2]It is true, as petitioner points out, that the court of appeals' memorandum erroneously asserts that this jurisdictional issue had not been properly preserved. Compare Pet. App. A.4 with *id.* at A.8. But petitioner drew this discrepancy to the attention of the court of appeals in a petition for rehearing. The court denied the petition (*id.* at A.2), thereby rejecting the jurisdictional argument.

Northwest Airlines, Inc. v. *Minnesota,* 322 U.S. 292, 303 (Jackson, J., concurring). See also *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633-634.

It is undisputed that this incident took place in the "airspace of the United States." In the exercise of its authority over that air space, Congress required the Federal Aviation Administration to promulgate regulations "for the protection of persons and property on the ground" (Section 307(c), 49 U.S.C. 1348(c)). The regulations violated by petitioner were promulgated pursuant to this statutory directive.

Petitioner contends, however, that there was no nexus between his offending flight and interstate commerce. Even if that is so, the flight gave grounds for believing that petitioner is a careless pilot, and the Administrator has the authority to protect the public from careless pilots by suspending petitioner's license, which allows him to engage in *inter*state flight. Moreover, as this Court has held, where Congress has created a pervasive regulatory scheme, it has the power to regulate purely intrastate activities that are ancillary to that scheme. *United States* v. *Midwest Video Corp.,* 406 U.S. 649; *United States* v. *Southwestern Cable Co.,* 392 U.S. 157. Cf. *Perez* v. *United States,* 402 U.S. 146.

3. Petitioner makes a number of other arguments. These arguments all depend on the particular facts of this case and afford no occasion to grant the petition.[3] What is more, none of them was presented to the court of appeals, and no exceptional circumstances justify this Court's entertaining them now. *United States* v. *Ortiz,* 422 U.S. 891, 898; *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n. 2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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[3]Petitioner's argument (Pet. 4, 17-20) that he was "discriminated" against was answered by the Board, which pointed out (a) that participants in the races could approach no closer than 1,000 feet to the spectators, whereas petitioner flew a plane within 25 feet of many people; and (b) that one other pilot who landed on the ramp had given notice and obtained permission, while petitioner had done neither (Pet. App. A.13). Petitioner's arguments (Pet. 4-5, 18-19) concerning the waiver of the regulations for the races, and the fact that it is not in the record, grow out of problems largely of his own making. Petitioner never sought to have the waiver introduced into evidence. His argument was not that the waiver was discriminatory or that it had authorized his maneuvers, but that the director of the races had given him an oral "carte blanche." The Board found that defense wanting both factually and legally (Pet. App. A.14). Petitioner cannot now complain that insufficient attention was paid to the written "waiver."